



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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The Honorable Ron Wyden
United States Senate
Washington, D.C. 20510

Dear Senator Wyden:

This responds to your letter dated August 8, 2007, to Principal Deputy Assistant Attorney General Steven G. Bradbury asking for more detail relating to the scope of Executive Order 13440 and to the Department's interpretation of several terms contained therein.

With respect to your first question, Executive Order 13440 interprets Common Article 3 of the Geneva Conventions as it applies to a program of detention and interrogation, such as the program operated by the CIA. The Military Commissions Act of 2006 ("MCA") provided that the President may issue authoritative guidance by executive order concerning how the United States interprets the meaning and application of the Geneva Conventions, beyond the criminal prohibitions of the War Crimes Act. See MCA § 6(a)(3). Executive Order 13440 provides a detailed set of substantive and procedural requirements that the CIA program must meet to ensure that it complies with our Nation's international obligations under Common Article 3 of the Geneva Conventions.

Your letter asked for clarification concerning the circumstances under which this order would apply. By its terms, the order interprets Common Article 3 as applied to the circumstances presented by the CIA's specialized detention and interrogation program. The Order is not intended to, and does not, displace or supersede the policies and directives of the Department of Defense that govern the treatment and interrogation of detainees by military personnel. Military personnel are subject to other legal restrictions and regulations, particularly the Army Field Manual on Interrogations, that separately ensure that their activities comply with the Geneva Conventions.

Your letter also asks how the United States interprets the "humane treatment" requirement of Common Article 3. Common Article 3 provides that detainees in a conflict not of an international character "shall in all circumstances be treated humanely." E.g., Geneva Convention Relative to the Treatment of Prisoners of War Art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135. Like the executive order, Common Article 3 does not directly define "humane treatment," but rather provides content by enumerating the specific prohibitions that would contravene that standard. In particular, Common Article 3 prohibits four specific and serious acts—"violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture"; the "taking of hostages"; "outrages upon personal dignity, in particular,

humiliating and degrading treatment"; and "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* Art. 3 ¶ 1(a)-(d)

Common Article 3 does not separately define humane treatment, and international tribunals have had difficulty identifying content to the humane treatment requirement that is distinct from the four specified prohibitions in Common Article 3. References to humane treatment elsewhere in the Geneva Conventions suggest that humane treatment may be associated with ensuring that detainees are supplied with the basic necessities of life—including adequate food, water, shelter from the elements, protection from extremes of heat and cold, necessary clothing, and essential medical care. *Cf. id.* Art. 20 (requiring that "[t]he evacuation of prisoners of war shall always be effected humanely" and shall include "sufficient food and potable water, and with the necessary clothing and medical attention"). Accordingly, the President's order requires that the CIA program not only comply with the specific prohibitions of Common Article 3, but also that detainees be provided with the basic necessities of life. See Exec. Order 13440 § 3(h)(iv). These provisions ensure that all detainees within the CIA program shall be treated humanely.

Your letter asks whether the meaning of humane treatment could vary based on the identity of the detainee or the information he is believed to possess. Common Article 3 requires that detainees be treated humanely "in all circumstances." At the same time, Common Article 3 does require consideration of the circumstances in evaluating whether in fact the governmental conduct would implicate the Article's specific prohibitions. For instance, Common Article 3 may prohibit "murder" regardless of circumstance, but the killing of an enemy combatant on the battlefield would not constitute a "murder." Thus, in evaluating whether a homicide violates Common Article 3, it would be necessary to consider the circumstances surrounding the act. (4)

Even more directly, Common Article 3's prohibition of "outrages upon personal dignity" requires consideration of the circumstances in determining whether conduct would amount to an outrage. For instance, a general policy to shave detainees for hygienic and security purposes may well be justifiable, but the targeted decision to shave the beard of a devout Sikh for the purpose of humiliation and abuse would raise different concerns. International tribunals interpreting Common Article 3 accordingly have recognized that what constitutes an "outrage" requires an evaluation of the motivation for the conduct and an objective weighing of the circumstances, so as to determine whether the conduct should be deemed to as outrageous and universally condemned. See, e.g., *Prosecutor v. Aleksovski*, IT-95-14/1-T, ¶¶ 55-56 (ICTY Trial Chamber I 1999). To rise to the level of an outrage, the conduct must be "animated by contempt for the human dignity of another person" and it must be so deplorable that the reasonable observer would recognize it as something that should be universally condemned. *Id.* Consistent

with these decisions, the executive order prohibits "willful and outrageous acts of personal abuse" that are "done for the purpose of humiliating or degrading the individual" and that are "so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency." Exec. Order 13440 § 3(h)(i)(E).

To be clear, neither the executive order nor Common Article 3 would permit an individual to commit an "outrage upon personal dignity" based upon the type of information a detainee is believed to possess or the government interest at stake. Nor would the purpose requirement demand that the individual act with specific intent; it requires merely an intent to humiliate and degrade. To make this clear, the executive order provides illustrations of the kinds of conduct that would be prohibited in all cases, regardless of the circumstances and purported justifications, including forcing an individual to perform sexual acts, threatening an individual with sexual mutilation, or using an individual as a human shield. *See also Aleksovski*, at ¶ 57 n 81 (noting that the use of a human shield "per se" violates Common Article 3). At the same time, these provisions reflect the common sense notion that a reasonable observer, in determining whether conduct should be deemed outrageous and particularly revolting, would take into account the circumstances surrounding the conduct, including what justifications might exist. *See id.* at ¶ 53 (noting that the standard established by Common Article 3 "is, in the nature of things, relative: it depends on all the circumstances of the case")

Your letter also asks whether the meaning of "cruel, inhuman and degrading treatment" ("CIDT") might similarly depend upon the circumstances. Congress prohibited CIDT of all persons in the custody of the United States, regardless of location or nationality, under the Detainee Treatment Act of 2005 ("DTA"). *See* Pub. L. 109-148, tit. X, § 1403(a), 119 Stat. 2680, 2739 (2005). The DTA defines CIDT to mean "the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States." Although Common Article 3 does not directly prohibit CIDT, Congress has recognized a close correspondence between the prohibition on CIDT and those of Common Article 3, describing the CIDT prohibition in the MCA as an "additional prohibition" directed at satisfying Common Article 3's obligations. *See* MCA § 6(c). Consistent with that statutory directive, Executive Order 13440 further requires that the CIA program comply with the prohibition on CIDT as a means of ensuring compliance with Common Article 3.

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With respect to captured terrorists who are subject to a detention and interrogation program like that of the CIA, the CDT prohibition requires compliance with the substantive component of the Fifth Amendment's Due Process Clause, which governs the types of treatment that are permissible without trial and conviction.¹ See, e.g., *Chavez v. Martinez*, 538 U.S. 760, 779-80 (2003); see also *id.* at 773 (plurality op.); *id.* at 787 (Stevens, J., concurring in part and dissenting in part). The Supreme Court has held that to violate substantive due process, the conduct must be deemed to "shock[] the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952); *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

Like Common Article 3's prohibition of outrages upon personal dignity, the CDT prohibition requires, under longstanding Supreme Court precedent, "an exact analysis of circumstances" in determining what "shocks the conscience." *Lewis*, 523 U.S. at 850; see also *id.* ("That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in light of other considerations, fall short of such a denial.") (internal quotation omitted). In any context, however, the Court has identified two general principles as relevant to determining whether the conduct "shocks the conscience." The test first requires an inquiry into whether the conduct is "arbitrary in the constitutional sense," that is, whether the conduct is proportionate to the governmental interest involved. *Id.* at 846. In addition, the test requires an objective inquiry into whether the conduct is "egregious" or "outrageous" in light of "traditional executive behavior and contemporary practices." *Id.* at 847 n.8. Accordingly, as with the prohibition upon outrages upon personal dignity, it is clear that while context and circumstance may be relevant to the analysis, some conduct would be deemed to "shock the conscience" under any circumstances.

If we can be of further assistance regarding this or any other matter, please do not hesitate to contact this office.

Sincerely,



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Principal Deputy Assistant Attorney General

¹ The Eighth Amendment prohibits the infliction of "cruel and unusual punishments" and does not apply until there has been a "formal adjudication of guilt." *Dell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979); see also *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480 (M.D.C. 2005) (dismissing detainees' Eighth Amendment claims because "the Eighth Amendment applies only after an individual is convicted of a crime"). The Fourteenth Amendment, which regulates the conduct of the States, does not apply to the federal Government. See, e.g., *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987).